88-414

No. 88-

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLUETT, PEABODY & COMPANY, INC.,
Petitioner,

v.

LHLC CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Of Counsel:
JACK HASSID
CLUETT, PEABODY & COMPANY, INC.
510 Fifth Avenue
New York, New York 10036
(212) 930-3000

WILBER H. BOIES, P.C.
Counsel of Record
HATEM H. EL-GABRI
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000
Counsel for Petitioner

September 8, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

This Court has ruled that (a) in order to defeat a motion for summary judgment, a nonmoving party may not rest on the possibility that the jury might disbelieve the moving party's evidence as to state of mind, and (b) to survive a properly supported motion for summary judgment, nonmovant must present concrete evidence that would support a jury verdict in his favor. The question presented in this Petition is whether these rulings are restricted to cases where the nonmoving party has the ultimate burden of proof, or whether these rulings apply where, as in this case, movant has the ultimate burden of proof and has relied on uncontradicted evidence as to his state of mind?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Cluett, Peabody & Company, Inc., the respondent LHLC Corporation, as well as Deloitte, Haskins & Sells ("Deloitte") which along with petitioner was a defendant-appellee. Deloitte is not named as a party herein. Petitioner, Cluett, Peabody & Company, Inc., is a wholly owned subsidiary of West Point-Pepperell, Inc., a publicly held corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE SEVENTH CIRCUIT OPINION ADOPTS STANDARDS AND PROCEDURES WHICH CREATE DIRECT AND INTOLERABLE CONFLICTS WITH DECISIONS OF THIS COURT, OTHER CIRCUITS AND FED. R. CIV. P. 56 WHICH (a) RECOGNIZE UNCONTROVERTED EVIDENCE OF STATE OF MIND AS A BASIS FOR GRANTING SUMMARY JUDGMENT; (b) ESTABLISH PROCEDURES AND STANDARDS FOR DENIAL OF SUMMARY JUDGMENT; AND (c) ESTABLISH SUBSTANTIVE EVIDENTIARY STANDARDS AS THE BASIS FOR DETERMINING THE EXISTENCE OF A GENUINE ISSUE OF FACT	7
A. Conflict As To Whether Movant's Uncontradicted State of Mind Evidence Can Be the Basis for Summary Judgment Where Movant Has The Ultimate Burden of Proof	8
1. The Opinion Ignores the Teachings of *Anderson*	9

TABLE OF CONTENTS—Continued

Page

2. The Conflict With Rule 56(e) 12

3. The Conflict With Other Circuits On State of Mind Evidence 13

4. Conflict As to Sufficiency and Credibility of Interested Testimony 14

5. The Conflict As To Drawing Contrary Inferences 15

B. The Conflict With Cases Which Require Nonmovant to Present Concrete Evidence That Would Support a Jury Verdict In Its Favor..... 18

C. The Conflict Created by the Test the Seventh Circuit Adopted for Determining the Existence of A Genuine Issue of Fact Where Movant Has the Ultimate Burden of Proof 20

II. THE SEVENTH CIRCUIT'S APPROACH MANDATES AN UNPRECEDENTED ROLE FOR TRIAL AND APPELLATE COURTS THAT VIOLATES BASIC PRINCIPLES AND PURPOSES OF SUMMARY JUDGMENT PRACTICE. THESE DRASTIC CONSEQUENCES WARRANT THE GRANTING OF THE WRIT AND EXERCISE OF THIS COURT'S POWER OF SUPERVISION 23

A. The Seventh Circuit's Approach Establishes A Rule Against Summary Judgment Whenever Movant Has the Ultimate Burden of Proof and Has Relied on Uncontradicted Evidence As To State of Mind 24

B. The Seventh Circuit's Approach Mandates An Unprecedented Role For Both Trial And Appellate Courts That Violates Basic Principles And Purposes Of Summary Judgment..... 25

CONCLUSION 29

TABLE OF CONTENTS—Continued

APPENDIX Page

(Opinion of Court of Appeals, Memorandum Decision of District Court, and Judgment of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing In Banc) 1a

TABLE OF AUTHORITIES

CASES: Page

Adickes v. Kress & Co., 398 U.S. 144 (1970) 21, 22, 26
Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 7, 9-11, 18-23, 25
Avila v. Travelers Ins. Co., 651 F.2d 658 (9th Cir. 1981) 12, 25
Browning v. Crouse, 356 F.2d 178 (10th Cir. 1966) 14-15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 7, 9, 13, 18, 19, 25, 28
Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 (1931) 14
Childers v. Power Line Equ't Rentals, Inc., 842 F.2d 689 (3d Cir. March 22, 1988, No. 87-3264) .. 27
Davis v. Mid-Continent Underground Storage, —— F. Supp. —— (D. Kan. Mar. 29, 1988, No. 85-2515) 17
First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 11
Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976) 14
Hideout Records & Dist. v. El Jay Dee, Inc., 601 F. Supp. 1048 (D. Del. 1984) 22
Houser v. Fox Theatres Management Corp., 845 F.2d 1225 (3d Cir. May 9, 1988, No. 87-5653) 14
Kaszuk v. Bakery & Confectionary Union, 791 F.2d 548 (7th Cir. 1986) 22
Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966) .. 28
Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945) 11, 25
Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986) 19, 20, 23, 25, 26
Matter of Citizens Loan & Sav. Co., 621 F.2d 911 (8th Cir. 1980) 15
Otteson v. United States, 622 F.2d 516 (10th Cir. 1980) 14
Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943) 12

TABLE OF AUTHORITIES—Continued

	Page
Saverslak v. Davis-Cleaver Produce, Co., 606 F.2d 208 (7th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980)	22
Topp-Cola v. Coca-Cola Co., 185 F. Supp. 700 (S.D. N.Y. 1960)	15
Trapkus v. Edstrom's, Inc., 140 Ill. App. 3d 720, 489 N.E.2d 340 (Ill. App. 1986)	23
United States v. Diebold, Inc., 369 U.S. 654 (1962)	17
United States v. One 1979 Chevrolet, —— F. Supp. —— (D. La. March 31, 1988, No. 87-4935)	17-18
United States v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987)	7, 19
United States v. 162-10/12 Cases, 138 F. Supp. 820 (S.D.N.Y. 1956)	12, 14
Walker v. American Motorists Ins. Co., 529 F.2d 1163 (5th Cir. 1976)	14
Walpert v. Bert, 280 F. Supp. 1006 (D. Md. 1967)	15
Webster v. Offshore Food Serv., Inc., 434 F.2d 1191 (5th Cir.), *cert. denied*, 404 U.S. 823 (1970)	15
Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940)	15

STATUTES:

Fed. R. Civ. P. 56	7, 13, 27, 28
Fed. R. Civ. P. 56(c)	2, 12, 19, 23
Fed. R. Civ. P. 56(e)	2-3, 9, 12, 13, 19
Fed. R. Civ. P. 56(f)	25
Securities Exchange Act of 1934, 15 U.S.C. ¶ 78	3
28 U.S.C. § 1254(1)	2

MISCELLANEOUS:

Sonenshein, *State of Mind and Credibility In the Summary Judgment Context: A Better Approach*, 78 Nw. L. Rev. 774 (1983)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-———

CLUETT, PEABODY & COMPANY, INC.,
Petitioner,

v.

LHLC CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Cluett Peabody & Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on March 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 842 F.2d 928 (7th Cir. 1988), and is reprinted in the appendix hereto, p. 1a, *infra*. The memorandum decision of the United States District Court for the Northern District of Illinois (Getzendanner, J.) has not been reported. It is reprinted in the appendix hereto, p. 16a, *infra*.

JURISDICTION

On respondent's appeal, the Seventh Circuit on March 8, 1988 entered a judgment and an opinion reversing the Northern District of Illinois' order granting petitioner

summary judgment. Petitioner timely filed a petition for rehearing and suggestion for rehearing *in banc*. The petition was denied on April 11, 1988. On July 1, 1988, Justice John Paul Stevens signed an Order Extending Time to File Petition for Writ of Certiorari to and including September 8, 1988. This Court's jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure, ("Fed. R. Civ. P. 56(c)"), provides in pertinent part:

> "(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(e) of the Federal Rules of Civil Procedure, ("Fed. R. Civ. P. 56(e)"), provides:

> "(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse

party's pleading but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

STATEMENT OF THE CASE

LHLC Corporation ("LHLC"), respondent, brought this suit against petitioner Cluett, Peabody & Co., Inc. ("Cluett") and Deloitte, Haskins & Sells ("Deloitte"). This petition arises from the Seventh Circuit's reversal of the Northern District of Illinois' grant of summary judgment dismissing LHLC's complaint. The complaint alleged claims under the Securities Exchange Act of 1934, 15 U.S.C. ¶ 78, *et seq.*, as well as pendent state claims.[1] This suit arises out of the sale of Lytton's, Henry C. Lytton & Co. ("Lytton's"). Petitioner sold the company to respondent; Deloitte served as petitioner's accounting firm. LHLC alleged that defendants defrauded it by materially misrepresenting the value of inventory during the sale of the company to it. p. 2a, *infra.*

Because of the inclusion of supporting evidence, the District Court treated petitioner's motion to dismiss as a motion for summary judgment. The District Court expressly found petitioner's evidence in support of its motion to be "uncontradicted by any evidence before the court," and granted petitioner summary judgment on the basis of an estoppel defense. p. 27a, *infra.*[2] Petitioner's uncontradicted evidence included the affidavit of Cluett's Chairman, Henry Henley, stating the contents of a telephone conversation he had with Thomas Rafferty, one of the two stockholders of LHLC. Henley's uncontradicted

---

[1] The basis for jurisdiction in federal court was the Securities Exchange Act of 1934, 15 U.S.C. ¶ 78, *et seq.*

[2] The court also dismissed the claims against Deloitte; the Seventh Circuit affirmed that dismissal. p. 8a, *infra.*

affidavit stated: (a) Rafferty told him that LHLC would give up its inventory overvaluation claim; (b) Henley relied upon that understanding in selling on credit to LHLC's subsidiary, Lytton's; and (c) Cluett lost money when Lytton's failed to pay for the goods it bought on credit. p. 27a, *infra*.

In opposition to Cluett's motion, LHLC chose to argue that, as a matter of law, the Henley affidavit and related documentary evidence did not support Cluett's equitable defenses, *i.e.*, LHLC told Henley that it would not sue now, but said nothing about suing later. pp. 21a, 25a-27a, *infra*. The District Court noted that under the substantive law, determination of estoppel requires a "focus[ ] not on the obligor's intent, but rather on the *effects* of his conduct on the obligee. . . ." p. 25a, *infra* (emphasis in the original). The District Court expressly found Henley's statement that,

> "[h]ad Cluett known that LHLC intended to pursue a claim for the alleged inventory overvaluation, Cluett would not have extended credit to LHLC's subsidiary, Lytton's, Henley Aff at ¶ 13, . . . [is] a fact [which] is uncontradicted by any evidence before the court and is not weakened by plaintiff's observation that LHLC's request for more generous credit terms was denied. The point is that, at a time in which Cluett was under no duty to deal with Lytton's on any terms, it continued to extend credit to the new company. . . ." (p. 27a, *infra*.)

Additionally, the District Court's finding that no jury would find Cluett's reliance unreasonable was based on Rafferty's own statement that he told Henley that LHLC "had neither the money, the time, nor the desire to enter suit against Cluett." pp. 26a, 28a, *infra*.[3] The District Court also found uncontradicted the fact that, in reliance

---

[3] The District Court also found that Rafferty's own affidavit was "remarkably similar" to Henley's file memorandum of the conversation. p. 21a n.5, *infra*.

on LHLC's promise not to sue, there was a resulting extension of credit by Cluett to Lytton's and Cluett was owed over $179,000 when LHLC's subsidiary, Lytton's, filed for bankruptcy. p. 27-28a, *infra.*

The Seventh Circuit reversed the grant of summary judgment, even though the Court of Appeals noted that the District Court found that Henley's statement was "uncontradicted, and therefore as sufficient support for summary judgment." p. 12a, *infra.* The Seventh Circuit viewed this uncontradicted evidence as:

> "a statement of [affiant's] intent to do something, not a statement about a fact that can be contradicted by hard evidence. Since Henley did not think that LHLC would sue, the statement was never put to the test. It is not now falsifiable, even if it is false. It may be that '[t]he state of a man's mind is as much a fact as the state of his digestion', *Edington* v. *Fitzmaurice*, (1884) 29 L.R. 459, 483 (Ch. Div.) (Bowen, L.J.), but it is not the kind of fact that is readily met by other affidavits." (p. 12a, *infra.*)

The Seventh Circuit's opinion went on to note that:

> "Cluett had the burden of establishing detrimental reliance. If Henley's self-serving statement about his intent is untrue, Cluett has not carried that burden." (p. 12a, *infra.*)

The opinion then set the following standard for evidence necessary to determine if Henley's "self-serving statement about his intent" is untrue:

> "A finder of fact would be free to disbelieve Henley's description of his intent, even if there were no contrary evidence, [based on whether] LHLC would have a fair argument in this case, [that] could appeal to reason rather than to whim if it urged a trier of fact to disagree with Henley's description of his plans." (p. 12a, *infra.*)

As reasons why a trier of fact might disbelieve the uncontradicted affidavit, the opinion then suggested ques-

tions and arguments about profitability and other economic factors as to which there was no evidence in the record. pp. 12a-14a, *infra*. As the opinion recognizes, (p. 12a, *infra*), there is nothing in the record as to whether Cluett did business with other companies which threatened Cluett. But the opinion's conclusion drawn from this unanswered question from the bench leads to the adoption of the following burden of proof on summary judgment:

> "Did Cluett cut off open account credit to other adversaries? We do not know, and the absence of such information could lead a jury to doubt Henley's words." (p. 12a, *infra*.)

This approach is repeated in the argument in the opinion that a jury could disbelieve Henley because of credit sales during the period before LHLC's promise not to sue or because of an assumed profit motive, although there was no evidence offered by LHLC concerning Cluett's profits:

> "If the sales on open account credit were profitable to Cluett, as we must suppose Cluett believed, then Cluett would injure itself by breaking off dealing. (p. 13a, *infra*.)
>
> * * * *
>
> If Cluett would have had sound business reasons to continue to deal with LHLC despite an ongoing dispute about the value of inventory, then a jury could rationally disbelieve Cluett's assertions, and, if it did, the basis for this finding of detrimental reliance would vanish." (p. 14a, *infra*.)

The Seventh Circuit opinion acknowledged that the arguments it makes concern factual questions about business practices and economic analysis which were not raised by LHLC in opposition to summary judgment (pp. 12a, 14a, *infra*), but concluded that:

> "Since Cluett bears the risk of non-persuasion on the estoppel question, a fair doubt about Henley's assertion precludes the award of summary judgment

even though LHLC has not presented evidence of its own that Cluett would have extended credit had LHLC filed suit in June 1983." (p. 14a, *infra.*)

The opinion's only direct citation of authority for rejecting the uncontradicted evidence of estoppel is a Seventh Circuit case involving prosecutorial comment during jury summation in a criminal case (*United States v. Sblendorio*, 830 F.2d 1382, 1396 (7th Cir. 1987). The opinion cited that case for the proposition that "[w]hen proof fails, the party with the risk of non-persuasion loses." p. 14a, *infra.* The opinion viewed this Court's decisions in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), to be in "contrast" to the case before it—citing both of these decisions as "contrast" cites, following the direct cite to the criminal case. p. 14a, *infra.*

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT OPINION ADOPTS STANDARDS AND PROCEDURES WHICH CREATE DIRECT AND INTOLERABLE CONFLICTS WITH DECISIONS OF THIS COURT, OTHER CIRCUITS AND FED. R. CIV. P. 56 WHICH (a) RECOGNIZE UNCONTROVERTED EVIDENCE OF STATE OF MIND AS A BASIS FOR GRANTING SUMMARY JUDGMENT; (b) ESTABLISH PROCEDURES AND STANDARDS FOR DENIAL OF SUMMARY JUDGMENT; AND (c) ESTABLISH SUBSTANTIVE EVIDENTIARY STANDARDS AS THE BASIS FOR DETERMINING THE EXISTENCE OF A GENUINE ISSUE OF FACT

The Seventh Circuit's opinion is predicated on an approach, standards and procedures which are in direct and intolerable conflict with decisions of this Court, other circuits and Fed. R. Civ. P. 56. First, the opinion creates a conflict as to whether movant's uncontradicted state of mind evidence can be the basis of summary judgment where movant has the ultimate burden of proof. Second,

the opinion creates a conflict as to the procedures and standards for the denial of summary judgment where movant has the ultimate burden of proof, *i.e.*, the quantum of evidence required of nonmovant to show that a jury could return a verdict in its favor on the evidence presented. Third, the opinion creates a conflict as to the test for determining the existence of a genuine issue of fact where movant has the ultimate burden of proof.

A. The Conflict As to Whether Movant's Uncontradicted State of Mind Evidence Can Be the Basis for Summary Judgment Where Movant Has the Ultimate Burden of Proof

Although the material evidence Cluett presented to the District Court was "uncontradicted by any evidence before the court," p. 27a, *infra*, the Seventh Circuit's reversal of summary judgment was based on the view that evidence as to the movant's state of mind is inherently suspect:

> "it is a statement of Henley's intent to do something, not a statement about a fact that can be contradicted by hard evidence. Since Henley did not think that LHLC would sue, the statement was never put to the test. It is not now falsifiable, even if it is false. . . . [I]t is not the kind of fact that is readily met by other affidavits. Cluett had the burden of establishing detrimental reliance. If Henley's self-serving statement about his intent is untrue, Cluett has not carried that burden. A finder of fact would be free to disbelieve Henley's description of his intent, even if there was no contrary evidence. The mere possibility that a jury would find Henley an incredible witness is not sufficient to send this case to a trial, however, if there is no reason to expect such a disposition. . . . We think, however, that LHLC would have a fair argument in this case; it could appeal to reason rather than to whim if it urged a trier of fact to disagree with Henley's description of his plans." (p. 12a, *infra*.)

The opinion viewed this Court's decisions in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), to be in "contrast" to this case, citing both of those decisions as "contrast" cites. Following the contrast cite to *Anderson* the opinion added this parenthetical statement: "(the party bearing the burden will have to present evidence to resist the motion and may not rest on the possibility that the jury will disbelieve the moving party's evidence)." p. 14a, *infra*. From this express attempt to distinguish *Anderson*, as well as the Seventh Circuit's holding that "[s]ince Cluett bears the risk of non-persuasion on the estoppel question, a fair doubt about Henley's assertion precludes the award of summary judgment even though LHLC has not presented evidence on its own . . .", (p. 14a, *infra*), it is clear that the Seventh Circuit viewed *Anderson* as limited to cases where the *nonmovant* bears the ultimate burden of proof. That view is in conflict with *Anderson*, Rule 56(e), and decisions in other circuits.

1. *The Opinion Ignores the Teachings of Anderson*

The Seventh Circuit's decision rests on the rejected premise that uncontradicted evidence of movant's state of mind cannot be the basis for the grant of summary judgment where movant has the ultimate burden of proof. For example, the Seventh Circuit's decision states that, as to the uncontradicted evidence of movant's state of mind:

> "[I]t is not now falsifiable, even if it is false," . . . "it is not the kind of fact that is readily met by other affidavits," . . . "[a] finder of fact would be free to disbelieve Henley's description of his intent, even if there is no contrary evidence," (p. 12a, *infra*) * * * "[s]ince Cluett bears the risk of non-persuasion on the estoppel question, a fair doubt about Henley's assertion precludes the award of summary judgment even though LHLC has not presented evidence of its own that Cluett would have

extended credit had LHLC filed suit in June 1983." (p. 14a, *infra.*)

This approach to state of mind evidence is in direct and intolerable conflict with *Anderson.* This Court in *Anderson* specified the procedures and standards to be used where movant's state of mind is in issue. *Anderson* expressly rejected the view that movant's state of mind cannot serve as the basis for summary judgment because the jury might disbelieve movant as to this issue:

> "Respondents argue, however, that whatever may be true of the applicability of the 'clear and convincing' standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464 (1962), for this proposition. We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service*, 391 U.S. at 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering 'any significant probative evidence tending to support the complaint.' As we have recently said, 'discredited testimony is not [normally] considered a

> sufficient basis for drawing a contrary conclusion.' *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

477 U.S. at 256-57. *Accord First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) (summary judgment granted defendant in antitrust claim where plaintiff did not offer any significant evidence of intent in response to defendant-movant's factual protestations of lack of intent or conspiracy).

Both *Anderson* and this case involved the grant of summary judgment based on movant's affidavit as to his state of mind. Under the authority of *Anderson*, in order to be entitled to denial of summary judgment, respondent was required to present "concrete evidence" entitling it to judgment in its favor. 447 U.S. at 256-57. It is of no consequence that petitioner had the ultimate burden of non-persuasion.[4] Applying directed verdict analysis to summary judgment motions, courts have held that summary judgment should be granted where movant has the ultimate burden of proof when movant has made out a prima facie case and has offered uncontradicted evidence in support of the motion. *See, e.g., Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945), holding that when the moving party has the

---

[4] *See* I(C) *infra*, showing that under the applicable substantive evidentiary standard required for determining the existence of a genuine issue of fact, petitioner met its burden and the burden switched to respondent.

burden of proof at trial and offers some evidence in support of its motion for summary judgment, the nonmovant must come forward with contrary evidence or lose on summary judgment because of its silence; *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943) (nonmoving party is required to "specify some opposing evidence which it can adduce and which will change the result"). *See also United States v. 162-10/12 Cases*, 138 F. Supp. 820, 822 (S.D.N.Y. 1956) (summary judgment granted movant who had burden of proving nonmovant's intent to defraud movant). Once the Rule 56(c),

> "burden is met by presenting evidence which, if uncontradicted, would entitle the moving party to a directed verdict at trial, Rule 56(e) shifts the burden to the opposing party to 'set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' "

Avila v. Travelers Ins. Co., 651 F.2d 658, 660 (9th Cir. 1981).

2. *The Conflict With Rule 56(e)*

The Seventh Circuit's approach is in direct and intolerable conflict with the express language of Fed. R. Civ. P. 56(e), which provides for a motion for summary judgment supported by affidavit and then provides that:

> "an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Rule 56(e) requirement that the adverse party "set forth specific facts showing . . . genuine issue for trial" is stated in the most mandatory language possible—"an

adverse party . . . must set forth specific facts . . . [i]f he does not so respond, summary judgment if appropriate, shall be entered against him." There is nothing in the express language of Rule 56(e) that lends support to the Seventh Circuit's approach denying summary judgment in cases where the movant has the ultimate burden of proof and movant relies on an uncontradicted affidavit as to state of mind. Rule 56 was deliberately drafted so as to not distinguish state of mind from other types of issues for summary judgment purposes:

> "Judge Clark, the primary architect of Rule 56 and the rest of the Federal Rules, has noted that the rulemakers deliberately chose not to exclude particular kinds of issues of fact from the ordinary requirements or treatment of Rule 56 in the face of some state models that do single out issue like state of mind as being inappropriate for summary judgment. *See, e.g., Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), in which Judge Clark noted that: 'the clear-cut provisions of F.R. 56 conspicuously do not contain either a restriction on the kinds of actions to which it is applicable (unlike most state summary procedures) or any presumption against its use. . . . [To hold otherwise] subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment [of Rule 56]. . . . Worse still, it is ad hoc legislation.' *Id.* at 479 (Clark, J. dissenting.)"

Sonenshein, *State of Mind and Credibility In the Summary Judgment Context: A Better Approach*, 78 Nw. L. Rev. 774, 787 n.49 (1983). *See Celotex, supra*, 477 U.S. at 325 (citing Rule 56(e) and holding that the Rule was not intended to add to the moving party's burden).

3. *The Conflict With Other Circuits On State of Mind Evidence*

The Seventh Circuit's approach is in conflict with decisions in other circuits affirming the propriety of summary judgment in cases whose resolution turns on the

movant's state of mind. *See, e.g., Houser v. Fox Theatres Management Corp*, 845 F.2d 1225 (3d Cir. May 9, 1988, No. 87-5653) (available on Lexis) (affirming grant of summary judgment as to movant's motives and intent in antitrust monopoly case); *Otteson v. United States*, 622 F.2d 516 (10th Cir. 1980) (affirming grant of summary judgment to defendant as to the existence of willful or malicious conduct under the Federal Tort Claim Act); *Walker v. American Motorists Ins. Co.*, 529 F.2d 1163 (5th Cir. 1976) (affirming grant of summary judgment to defendant as to insurance fraud); *Hahn v. Sargent*, 523 F.2d 461, 462 (1st Cir. 1975) (civil rights conspiracy), *cert. denied*, 425 U.S. 904 (1976). *See also United States v. 162-10/12 Cases, supra* (summary judgment granted on evidence of nonmovant's intent to defraud).

4. *Conflict As To Sufficiency and Credibility of Interested Testimony*

The Seventh Circuit's approach—that summary judgment is inappropriate merely because determination of a party's mental state may involve questions of credibility—is in direct conflict with this Court and other circuits and, in effect, rejects uncontradicted testimony as interested and suspect. To begin with, the fact that the affiant was chief executive of the defendant does not make his affidavit suspect. This Court in *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 214, 216-17 (1931), adopted a rule for federal courts that permits the trial judge to instruct the jury to believe interested testimony, which is otherwise unimpeached and uncontradicted. And where nonmovant's "indefinite and inconclusive" showing "casts only a conjectural and insubstantial doubt" on the movant's evidence, that evidence " 'may not be disregarded, even though adduced from interested witnesses, and [therefore] no question of credibility or issue of fact is presented for determination' by the trier of facts."

Browning v. Crouse, 356 F.2d 178, 180 (10th Cir. 1966) (citation omitted).

The Seventh Circuit's approach is in conflict with the principles adopted in other circuits: the nonmovant must demonstrate the existence of "sufficient evidence to show the court that at trial he will be able to produce some facts to shake the credibility of the affiants. Mere hopes are not enough." *Walpert v. Bert*, 280 F. Supp. 1006, 1013 (D. Md. 1967). *See Matter of Citizens Loan & Sav. Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (plaintiff attacked defendant's credibility and attempted thereby to raise a factual question not susceptible of summary judgment. The court replied that "[w]hile doubts over the movant's credibility sometimes lead a court to conclude that summary judgment is improper, . . . the opponent of the motion must allege some basis or ground for his attack on the witness."); *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (the fact-finder is not at liberty to disregard "unequivocal, uncontradicted and unimpeached testimony."); *Whitaker v. Coleman*, 115 F.2d 305, 306 (5th Cir. 1940) (summary judgment should be granted when there is no contradictory evidence or where that which is offered is too incredible to be accepted by reasonable minds). In comparison, under the Seventh Circuit's approach a plaintiff would be permitted to avoid summary judgment and advance to trial "merely by suggesting that the defendant's affidavits may be false. Such a rule would make a mockery of the summary judgment procedure under Rule 56." *Topp-Cola v. Coca-Cola Co.*, 185 F. Supp. 700, 708 (S.D.N.Y. 1960).

5. *The Conflict As To Drawing Contrary Inferences*

The Seventh Circuit's approach cannot be reconciled with the decisions of this Court and other circuits as to the drawing of contrary reasonable inferences. The Seventh Circuit opinion conceded that respondent had not presented contrary evidence, (pp. 12a, 14a, *infra*), and ex-

pressly based the reversal of summary judgment on the approach that, "[a] finder of fact would be free to disbelieve [petitioner's] description of [its] intent, even if there were no contrary evidence." p. 12a, *infra*.

It is clear from the opinion that respondent did not present any fact from which a reasonable inference of lack of detrimental reliance can be drawn. Instead, the Court of Appeals itself created and then relied on inferences based on unsupported conjecture. The opinion suggests several specific arguments for nonmovant which LHLC did not assert in response to the motion or even on appeal. pp. 12-14a *infra*. Indeed, the opinion concedes that respondent "has not presented evidence of its own that [petitioner] would have extended credit had [respondent] filed suit. . . ." p. 14a, *infra*. Nonetheless, the opinion reverses the district court because of the Court of Appeals' own questions about petitioner's credit sales practices which the opinion recognizes are not answered by the record. pp. 12-14a, *infra*. Without any evidence, the opinion depends on arguments for respondent based on what "we must suppose [petitioner] believed" about the profitability of doing business with respondent (p. 13a, *infra*) and what petitioner "might have believed" about the economic impact of cutting off credit. p. 13a, *infra*. As the opinion recognizes, (p. 12a, *infra*), there is nothing in the record as to whether petitioner did business with other companies which threatened to sue petitioner. But the conclusion drawn from this unanswered question turns the burden of proof on summary judgment upside down:

> "Did [petitioner] cut off open account credit to other adversaries? We do not know, and the absence of such information could lead a jury to doubt Henley's words." (p. 12a, *infra*.)

This approach is repeated in the argument in the opinion that a jury could disbelieve Henley because of credit sales during the same period as the respondent's prom-

ise not to sue or because of an assumed profit motive—although there was absolutely no evidence offered by respondent concerning petitioner's profits:

> "If the sales on open account credit were profitable to Cluett, as we must suppose Cluett believed, then Cluett would injure itself by breaking off dealing. (p. 13a, *infra.*)
>
> * * * *
>
> If Cluett would have had sound business reasons to continue to deal with LHLC despite an ongoing dispute about the value of the inventory, then a jury rationally could disbelieve Cluett's assertions. And if it did, the basis for this finding of detrimental reliance would vanish." (p. 14a, *infra.*)

Such "inferences" are insufficient to withstand summary judgment, whether the inferences came from a respondent's argument or from the bench. Summary judgment analysis mandates that inferences "be drawn from the subsidiary facts [if] contained in the affidavits, attached exhibits, and depositions" submitted in opposition to summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (inferences must "be drawn from the underlying facts contained in such materials.") Where there is "no contrary evidence," "inferences" may not properly be drawn out of thin air or from the Court of Appeals' own theoretical analysis of what the court "must suppose Cluett believed," based on the Court of Appeals' own theory that "[i]f Cluett would have had sound business reasons to continue to deal with LHLC . . . the basis . . . of detrimental reliance would vanish." pp. 13a, 14a, *infra. See Davis v. Mid-Continent Underground Storage*, —— F. Supp. ——(D. Kan. Mar. 29, 1988, No. 85-2515) (available on LEXIS) (plaintiffs "have not presented facts from which reasonable inferences of discriminatory conduct can be drawn, but instead have relied on inferences based on unsupported conjectures. . . . Such inferences are insufficient to withstand summary judgment."); *United States v. One 1979 Chev-*

rolet, —— F. Supp. —— (D. La. March 31, 1988, No. 87-4935) (available on LEXIS) (In *Celotex*, "the Supreme Court held that a party opposing a summary judgment motion must provide some evidence to support its position.")

B. The Conflict With Cases Which Require Nonmovant to Present Concrete Evidence That Would Support a Jury Verdict In Its Favor

In reversing the summary judgment, the Seventh Circuit held that summary judgment is improper because "[a] finder of fact would be free to disbelieve Henley's description of his intent, even if there is no contrary evidence," (p. 12a, *infra*), *i.e.*, if,

> "a rational trier of fact could take a different view about Henley's statement. Since Cluett bears the risk of non-persuasion on the estoppel question, a fair doubt about Henley's assertion precludes the award of summary judgment even though LHLC has not presented evidence of its own that Cluett would have extended credit had LHLC filed suit in June 1983. When proof fails, the party with the risk of non-persuasion loses." (p. 14a, *infra.*)

The procedures and standards adopted by the Seventh Circuit are in direct conflict with *Anderson.*

As expressed clearly in *Anderson*, the standard for denial of summary judgment is not the Seventh Circuit's test of whether "[a] finder of fact would be free to disbelieve [movant's] description of his intent, even if there is no contrary evidence," (p. 12a, *infra*), nor is the standard whether "a rational trier of fact could take a different view about [movant's] statement," nor does "a fair doubt about movant's assertion preclude[] the award of summary judgment even though [plaintiff] has not presented evidence of its own". p. 14a, *infra.* The approach and standards adopted by the Seventh Circuit are the very ones that this Court expressly rejected in *Anderson*:

> "If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict . . . the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff [nonmovant] on the evidence presented."

477 U.S. at 252. *Anderson* expressly rejected the argument that summary judgment may be defeated, "without [nonmovant] offering any concrete evidence from which a reasonable juror could return a verdict in his favor, . . . by [plaintiff] merely asserting that the jury might, and legally could, disbelieve the defendant's [state of mind evidence]." 477 U.S. at 256.[5]

The Seventh Circuit's approach is also in conflict with this Court's opinions in *Celotex*, *supra*, and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986). *Celotex* held that "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admission on file,' designate 'specific facts showing that there is a genuine issue for trial.' " 477 U.S. at 324. Similarly, in *Matsushita*, this Court held that:

> "the issue of fact must be 'genuine.' Fed. Rule Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must

---

[5] The Seventh Circuit's only citation to authority in support of its novel approach is to *United States v. Sblendorio*, 830 F.2d 1382, 1396 (7th Cir. 1987), a criminal case, where it was stated: "where the prosecutor's argument leaves the impression that both sides depend on rhetoric rather than evidence, then a conscientious jury should acquit (because the government bears the risk of nonpersuasion)." Clearly the Seventh Circuit's reliance on this criminal case does not address the concerns of Fed. R. Civ. P. 56(c) and (e) which were expressly underscored in *Anderson*.

come forward with 'specific facts showing that there is a *genuine issue* for trial' Fed. Rule Civ. Proc. 56(e) (emphasis added)." 475 U.S. at 586-87.

C. The Conflict Created By the Test the Seventh Circuit Adopted for Determining the Existence of A Genuine Issue of Fact Where Movant Has the Ultimate Burden of Proof

This petition raises profound concerns in view of the Seventh Circuit's (a) limitation of *Anderson* as to not apply where movant has the ultimate burden of proof and has relied on uncontradicted evidence as to his state of mind, and (b) the resulting abrogation of the procedures and standards for denial of summary judgment, including (1) the requirement that existence of a genuine issue of fact is determined by reviewing the evidence through the prism of the substantive evidentiary burden, and (2) the quantum of evidence requiring that summary judgment should be denied only where nonmovant presents concrete evidence that would support a jury verdict in its favor.

The test adopted by the Seventh Circuit for determining the existence of a genuine issue of fact where movant has the ultimate burden of proof creates a serious conflict on these issues. The Seventh Circuit concluded that genuine factual issues existed, requiring jury resolution for the following reasons: (1) "[t]he mere possibility that a jury would find Henley an incredible witness . . . if there is . . . reason to expect such a disposition;" (2) respondent "would have a fair argument in this case; it could appeal to reason rather than to whim if it urged a trier of fact to disagree with Henley's description of his plans;" (3) "a rational trier of fact could take a different view about Henley's statement;" and (4) "[s]ince Cluett bears the risk of non-persuasion . . ., a fair doubt about Henley's assertion precludes the award of summary judgment even though LHLC has not

presented evidence of its own. . . ." pp. 12a, 14a, *infra*. This "approach" is in direct and intolerable conflict with this Court's holding that,

> "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. . . . Consequently, . . . the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant,"

Anderson, supra, 477 U.S. at 255, and "[i]f the [nonmoving party's] evidence is merely colorable, . . . or is not significantly probative, summary judgment may be granted." *Id.* at 249-50. Further, since petitioner,

> "met its initial burden . . . Rule 56(e) . . . required [respondent] to have done more than simply rely on the contrary allegation in [its] complaint. To have avoided conceding . . . fact[s] [set in the affidavit] for purposes of summary judgment, [respondent] would have had to come forward with either (1) [an] affidavit [meeting petitioner's initial burden] or (2) [with] an affidavit under Rule 56(f) explaining why at that time it was impractical to do so."

Adickes v. Kress & Co., 398 U.S. 144, 160 (1970).

The Seventh Circuit's approach led the Court of Appeals to commit two errors: (1) holding that petitioner's "proof fails," because "a fair doubt about Henley's assertion precludes the award of summary judgment even though [respondent] has not presented evidence of its own. . . .", (p. 14a, *infra*), and (2) distinguishing *Anderson* by misconstruing and limiting the application of this Court's requirement of submitting concrete evidence to resist a motion for summary judgment.

The *Anderson* rule, that a plaintiff may not rest on the possibility that the jury might disbelieve the moving

party's evidence, is not limited to cases where the nonmovant is the "party bearing the burden." p. 14a, *infra*. Had the Seventh Circuit followed this Court's admonition that existence of a genuine issue of fact is determined "by the substantive evidentiary standards that apply to the case," it would not have committed these errors. Under "the substantive evidentiary standards that apply to the case," (a) "[e]stoppel . . . focuses not on the obligor's intent, but rather on the effects of his conduct on the obligee," *Saverslak v. Davis-Cleaver Produce, Co.*, 606 F.2d 208, 213 (7th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980), and (b) respondent's failure to submit any concrete evidence contradicting petitioner's affidavit in support of summary judgment, leads to "the court's acceptance as true of the facts set forth in the [petitioner's] affidavit." *Kaszuk v. Bakery & Confectionary Union*, 791 F.2d 548, 558 (7th Cir. 1986); *Hideout Records & Dist. v. El Jay Dee, Inc.*, 601 F. Supp. 1048, 1053 (D. Del. 1984) ("as numerous courts have held if the facts stated in the affidavits of the moving party are not contradicted by facts stated in the affidavits of the party opposing the motion for summary judgment, they should be accepted as true.") *See Adickes, supra*, 398 U.S. at 160.

Under the applicable substantive evidentiary standards, if the same evidence was presented at trial, respondent at trial would have failed in meeting its burden of rebutting petitioner's concrete evidence—consequently petitioner's uncontradicted evidence would have been required to be accepted as true, and thus the elements of estoppel would have been established. *See Anderson, supra*, 477 U.S. at 250 (the standard for granting summary judgment mirrors the standard for a directed verdict). Since under the substantive evidentiary standards, a jury could not have returned a verdict for respondent, any theoretical disputes about material facts were not genuine. *Anderson, supra*, 477 U.S. at 248 ("summary judgment will

not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.")

It is of no significance that petitioner had the ultimate burden of non-persuasion; under the applicable substantive evidentiary standards, petitioner met its burden and the burden switched to respondent. As this Court has held, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine* issue for trial.'" *Matsushita, supra*, 475 U.S. at 586-87 (emphasis in the original).

When "review[ing] the evidence presented through the prism of the substantive evidentiary burden," *Anderson, supra*, 477 U.S. at 254, a genuine issue of fact did not exist on this record and petitioner's proof did not fail. In effect, the Seventh Circuit "substitute[d] personal opinion for evidence. It is not the province of the lower court to effect agreements that make business sense and dismiss those agreements which do not." *Trapkus v. Edstrom's, Inc.*, 140 Ill. App. 3d 720, 489 N.E.2d 340, 344 (Ill. App. 1986).

II. THE SEVENTH CIRCUIT'S APPROACH MANDATES AN UNPRECEDENTED ROLE FOR TRIAL AND APPELLATE COURTS THAT VIOLATES BASIC PRINCIPLES AND PURPOSES OF SUMMARY JUDGMENT PRACTICE. THESE DRASTIC CONSEQUENCES WARRANT THE GRANTING OF THE WRIT AND EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The practical results of the Seventh Circuit's approach is (1) automatic denial of summary judgment whenever a movant has the ultimate burden of proof and he relies

on uncontradicted evidence as to his state of mind; and (2) the obliteration of the carefully drawn rules as to duties and roles of the respective parties and the courts in summary judgment procedure. These drastic consequences impact a wide range of cases and would make summary judgment procedure a dead letter in cases which could properly be resolved short of trial by the use of affidavits and deposition testimony.

A. The Seventh Circuit's Approach Establishes A Rule Against Summary Judgment Whenever Movant Has the Ultimate Burden of Proof and Has Relied on Uncontradicted Evidence As To State of Mind

The approach adopted by the Seventh Circuit establishes in practical effect a *per se* rule denying summary judgment whenever state of mind is the basis of summary judgment and the movant has the ultimate burden of proof. This is the inevitable consequence of the Court of Appeals' approach; the opinion says quite clearly that "uncontradicted evidence" of state of mind is determined to be an insufficient basis for summary judgment because "[a] finder of fact would be free to disbelieve [affiant's] description of his intent, even if there were no contrary evidence." p. 12a, *infra*. To be entitled to a denial or reversal of summary judgment under the Seventh Circuit's approach, all that needs to be done is to argue or have a court on its own discern that "[nonmovant] would have a fair argument in this case; it could appeal to reason rather than to whim if it urged a trier of fact to disagree with [movant]," *i.e.*, if a "rational trier of fact could take a different view about [affiant's] statement," and "a fair doubt about [affiant's] assertion precludes the award of summary judgment even though [nonmovant] has not presented evidence of its own. . . ." pp. 12a, 14a, *infra*.

This approach simply leads to movants always being denied summary judgment in this situation. In contrast,

the accepted and usual course of judicial proceedings mandates that a ruling on summary judgment "is to be made on the record the parties actually presented, not on one potentially possible." *Madeirense Do Brasil, supra*, 147 F.2d at 405. In considering the Seventh Circuit's approach as set out in the opinion, it is hard to imagine a more direct and intolerable conflict with this Court's approach in recent and significant decisions. *See Anderson, supra; Celotex, supra*; and *Matsushita, supra.* The drastic consequences of *per se* denial of summary judgment would impact any number of cases involving reliance on uncontradicted evidence as to state of mind to meet the movant's burden of proof. The Seventh Circuit's approach and standards are a far departure from the accepted and usual course of judicial proceedings, strongly counseling this Court's granting the writ and exercising its power of supervision.

B. The Seventh Circuit's Approach Mandates An Unprecedented Role For Both Trial and Appellate Courts That Violates Basic Principles and Purposes of Summary Judgment

Respondent had ample opportunity in the trial court to argue its case against petitioner's motion on some grounds and not assert others. Instead of taking discovery about Cluett's credit practices and credit sales profitability—the road map of arguments and discovery that the Court of Appeals draws for respondent—LHLC chose to argue that—as a matter of law—the Henley affidavit and related documentary evidence did not support Cluett's equitable defenses. Respondent also did not utilize Fed. R. Civ. P. 56(f), enabling a party to request either a continuance or refusal of summary judgment on the strength of an affidavit showing reasons for not being able to oppose movant's evidence. See *Avila, supra*, 651 F.2d at 660 (Rule 56(f) may not properly be invoked for the first time on appeal.)

The Seventh Circuit opinion in effect excused respondent from presenting its case. Instead of the principled disposition of motions for summary judgment mandated by this Court in decisions requiring nonmovant to offer concrete evidence from which a jury could return a verdict in its favor, the Seventh Circuit adopts an unpredictable summary judgment approach based on a court's own willingness to discover theoretical possibilities which are within the realm of the court's ingenuity but which are totally absent from the record opposition to summary judgment. The Seventh Circuit's approach eliminates the respective burdens imposed on the parties and leaves the disposition of summary judgment dependent on the court's ability and willingness to engage in non-evidentiary theoretical analysis. Indeed the Seventh Circuit's approach mandates trial court's denial of uncontested summary judgment whenever the court could discern "a fair argument" for nonmovant. p. 12a, *infra*. This approach is based on "metaphysical doubt as to the material facts" which this Court expressly held was insufficient to deny summary judgment, *Matsushita*, *supra*, 475 U.S. at 586, and is a far departure from the accepted and usual course of judicial proceedings.

This Court has repeatedly emphasized that any statements which are not in the record below "could not be considered by the trial court," and it manifestly cannot be considered by the appellate courts. *Adickes*, *supra*, 398 U.S. at 157 n.16. Even where there are facts in the record which are unidentified in the opposition to summary judgment,

> "allowing a nonmoving party opposing a motion for summary judgment to rest on mere denials where there are unidentified facts of record which may contradict the facts identified by the movant would be an unworkable and illogical rule. It would require a district judge to search through an often voluminous written record for facts which might support the nonmovant's claim, and would require this Court to review the district judge's search to insure that

> no facts were missed. It would permit the party to present facts, and argument based on those facts, to the Court of Appeals where that party had not identified those facts to the district court. [Such an approach] would misread the requirement of Rule 56(e) that the nonmoving party 'set forth specific facts showing that there is a genuine issue for trial.' Fed. R. Civ. P. 56(e)."

Childers v. Power Line Equ't Rentals, Inc., 842 F.2d 689 (3d Cir. March 22, 1988, No. 87-3264) (printed on Lexis).

The Seventh Circuit's approach goes even further than the unsanctioned approach of allowing a party to raise evidence which was in the record but was not cited in opposition to the motion for summary judgment. Under the Seventh Circuit's approach the court itself can suggest theoretical arguments and prospective "evidence" that are concededly not in the record but which "would [enable respondent to] have a fair argument in this case . . . if it urged" these arguments in the district court, *e.g.*, what "we must suppose Cluett believed" about the profitability of doing business with LHLC and what "Cluett might have believed" about the economic impact of cutting off credit. p. 13a, *infra*. Significantly, under the approach taken by the Seventh Circuit, trial courts could be considered to have failed in their duty, and would be reversed, if they failed not only to comb the record but even to imagine "a fair argument" that nonmovant could have theoretically made. p. 12a, *infra*. This result is exactly what happened to the district judge who heard and decided this case.

This approach is a drastic and erroneous departure from the dictates of Fed. R. Civ. P. 56, and this Court's and other courts' interpretations of summary judgment procedures and standards:

> "The position declaring that a party opposed to a summary judgment based upon affidavits must as-

> sume some initiative in showing that a factual issue actually exists is perfectly sound in the light of Rule 56, Fed. R. Civ. P., which specifically allows the use of affidavits in summary judgment proceedings. For if plaintiff's position is correct that an affiant's credibility is always an issue for the trial court, then the granting of a summary judgment would be virtually impossible when it is based in any way upon an affidavit. Rule 56 would be nullified by the prevailing party's use of one affidavit and the bald objection by the opposing party to the affiant's credibility. The reference in this rule to 'affidavits' would therefore have no effect. This does not mean that an affiant's credibility cannot properly be put in issue by a litigant, but in doing so specific facts must be properly produced. At this point the 1963 amendment to Rule 56(e) comes into play requiring the opposing party to respond or suffer the fate of a summary judgment, if otherwise appropriate.

Lundeen v. Cordner, 354 F.2d 401, 409 (8th Cir. 1966). *See Celotex, supra*, 477 U.S. 317 (Rule 56 requires that a plaintiff adduce evidence, not merely argument, in response to a properly supported motion for summary judgment).

The approach taken by the Seventh Circuit's opinion ignores the proper construction of Rule 56 which gives due regard not only for the rights of plaintiffs, "but also for the right of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Celotex, supra*, 477 U.S. at 327. In this case, there is a vigorous argument in the opinion that other economic motivations could offer an alternative explanation to petitioner's sworn affidavit about its business decision. But the questions suggested in the opinion are only the Court of Appeals' own questions, not evidence presented in opposition to petitioner's motion. The opinion creates direct and intolerable conflicts

with the decisions of this Court and other circuits and would have a major impact on summary judgment practice. As precedent, the opinion would be cited by litigants to avoid summary judgment in numerous recurrent situations—any case in which the motion is based on affidavit about what affiant knew, did, intended, decided or believed. Since the possibility exists that any witness could be disbelieved even where his affidavit is uncontradicted, creative counsel and overactive courts can easily suggest matters not in evidence which could meet the Seventh Circuit's "standard" for challenging the credibility of the affiant. The Seventh Circuit's approach is a far departure from the accepted and usual course of judicial proceedings and calls for exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILBER H. BOIES, P.C.
Counsel of Record
HATEM H. EL-GABRI
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000
Counsel for Petitioner

Of Counsel:
JACK HASSID
CLUETT, PEABODY & COMPANY, INC.
510 Fifth Avenue
New York, New York 10036
(212) 930-3000

September 8, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 86-3055, 87-2002

LHLC CORPORATION,
Plaintiff-Appellant,

v.

CLUETT, PEABODY & COMPANY, INC.,
and DELOITTE, HASKINS & SELLS,
Defendants-Appellees.

Argued Jan. 15, 1988

Decided March 3, 1988

Rehearing and Rehearing En Banc

Denied April 11, 1988

Bruce Rose, Beigel & Sandler, Chicago, Ill., for plaintiff-appellant.

Wilbur H. Boies, McDermott, Will & Emery, Joan M. Hall, Jenner & Block, Chicago, Ill., for defendants-appellees.

Before CUMMINGS, EASTERBROOK, and MANION, Circuit Judges.

EASTERBROOK, Circuit Judge.

For many years Henry C. Lytton & Co., which operated a number of department stores, was a subsidiary of

Cluett, Peabody & Co. In 1983 Cluett sold its stock in Lytton for $14.5 million to LHLC Corp., a closely-held firm that financed the acquisition almost entirely by debt, which it hoped to repay out of income from Lytton's future operations. Almost $8 million of the purchase price represented the estimated value of Lytton's inventory. Less than a year after acquiring Lytton's, LHLC Corp. filed for bankruptcy. Among its creditors, to the tune of about $180,000, was Cluett, which sold goods to LHLC on open account.

LHLC believes that Cluett misrepresented the value of Lytton's inventory, inducing LHLC to pay a price higher than the facts warranted. It filed this suit under § 10(b) of the Securities Exchange Act of 1984, 15 U.S.C. § 78j(b), and the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5, with pendent claims under state law. The suit may proceed even though Cluett sold LHLC the entire business. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985). According to the complaint, after Cluett had failed to sell goods on which markdowns had been taken, it placed the merchandise back in inventory and told LHLC that it was salable at retail price. Cluett did not allow LHLC to inspect the inventory before the sale (for fear that this would disrupt operations and impair the morale of the staff); the contract of sale contains not only Cluett's warranty of the value of the inventory but also a statement that LHLC "strictly relied" on Cluett's representations.

LHLC named Deloitte, Haskins & Sells, Cluett's accountant, as a second defendant. The contract between Cluett and LHLC required Cluett to furnish LHLC with a report of the value of the inventory. The report, which Deloitte approved, showed that the inventory was properly valued at some $7.9 million in accordance with generally accepted accounting principles. LHLC believes that this, too, was false and fraudulent; it characterizes Deloitte as Cluett's aider and abetter.

The district court granted summary judgment to Cluett on the ground that LHLC is estopped to pursue any remedy against it, dismissed the securities claim against Deloitte for failure to state a claim on which relief may be granted, 665 F.Supp. 637 (N.D.Ill.1987), and dismissed the pendent state claims against Deloitte for lack of subject-matter jurisdiction. We start with the claim against Deloitte.

I

A deal of this kind depends on an accurate valuation of the assets of the firm being sold. That value changes from day to day. The parties recognized this and assessed the worth of the assets on at least three occasions. One was at the end of December 1982, when Cluett furnished LHLC a tentative valuation of the inventory, cash, receivables, and other fluctuating items. The second was on February 4, 1983, the date of closing, when Cluett informed LHLC of its estimate of the value of the inventory (and the other fluctuating items) as of January 31, 1983, the date the parties had chosen for fixing the price. LHLC paid the price implied by Cluett's estimates. The third was in March 1983, when Cluett drew up a final statement of the actual January 31 values that had been estimated on February 4. The contract required the parties to make adjustments in the price for any differences between the preliminary estimate of February 4 and the final estimate of March.

The value of the inventory was estimated on each occasion; unlike cash on hand, it could not be measured with precision. On February 4 Cluett furnished LHLC with an "inducement letter" stating that it would provide a final valuation of the inventory in accordance with generally accepted accounting principles, and that its accountant would so certify. Cluett drew up a balance sheet, assessing the worth of the inventory at $7.9 million as of January 31, 1983. Deloitte sent Cluett a letter, dated March 7, 1983, stating that this balance sheet

fairly represented the value of the inventory in accordance with generally accepted accounting principles. Cluett relayed this letter to LHLC. This is the only writing signed by Deloitte that reached LHLC. LHLC says that Cluett's estimate is $2.7 million high, and that Deloitte's letter, like Cluett's balance sheet, is fraudulent.

LHLC's difficulty is that the communication from Deloitte arrived after the closing. It was too late for LHLC to back out of the sale. LHLC made its investment on February 4, 1983. Only the potential for litigation remained. The most it could have done—if, say, Deloitte's letter had said that Cluett's figure was too high and that the proper figure was $5.2 million—would have been to make a claim against Cluett under the warranty.

The district judge concluded that any misstatements in Deloitte's letter were not "material" because they did not affect LHLC's decision to close the transaction on February 4. 665 F.Supp. at 639-41. One could say equivalently, and perhaps more accurately, that nothing Deloitte did or could have done caused LHLC to make an investment decision. Materiality has an element of causation built in, because a statement is material only if it so alters the "total mix" of information available to the investor that it has the potential to affect the decision. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976). But materiality usually refers to the importance of the information; a datum that would have only a small effect on the price is not material, while a datum with the potential for a larger effect is. The valuation of the inventory ($7.9 million versus $5.2 million) would be material in this usual sense, except for the fact that Deloitte did not communicate with LHLC until after the closing. By then it was too late. The information, even if conventionally "material", did not affect the investment decision.

Ever since *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380-81 (2d Cir.1974), courts have been distinguishing between "transaction causation" and "loss causation". See Thomas Lee Hazen, *The Law of Securities Regulation* § 11.5 (1985) (collecting cases). *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785-86 (11th Cir.1988), is a recent example. The plaintiff must show both. "Loss causation" means that the investor would not have suffered a loss if the facts were what he believed them to be; "transaction causation" means that the investor would not have engaged in the transaction had the other party made truthful statements at the time required. These terms, ungainly to start with because they conscript nouns for service as adjectives, have been confusing in practice because they do not link the definition of "causation" to any theory about why people might be liable under the securities laws. The "transaction" in question is undefined. It is almost always possible to show that a given disclosure or nondisclosure could have affected *some* transaction, at some level of probability. Used without care, these terms hinder rather than facilitate understanding. See Hazen at 321; Richard Jennings & Harold Marsh, *Securities Regulation: Cases and Materials* 1047 (5th ed. 1982). What should happen when the missing information affected a decision not to file a lawsuit about the securities, as in *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir.1977)?

We have suggested in recent years that the appropriate inquiry is whether the information disclosed or withheld affected an *investment* decision. E.g., *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 704 (7th Cir.1987) (collecting cases). See also, e.g., *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 847-48 (2d Cir.1986). The securities laws single out investment decisions concerning financial instruments from among the many decisions people must make. Whether to buy a house or go to school or take a job or file a suit may be important, but the securities laws do not apply to these decisions. The

securities laws deal with instruments that have at least the potential to be traded in liquid markets, see *Marine Bank v. Weaver*, 455 U.S. 551, 560, 102 S.Ct. 1220, 1225, 71 L.Ed.2d 409 (1982). Information about these instruments should be compiled and released by a single source, usually the issuer, to facilitate both trading among passive investors and the ability to compare the prospects of one firm against the prospects of others—a comparison essential if capital is to flow to its most valuable uses. If a person is locked into possession of a security, however, disclosure serves neither of these functions. Capital has been committed, and trading will not occur. Decisions concerning the securities then are not fundamentally different from decisions concerning works of art. The buyer of a purported Rembrandt who learns that the painting was only by "the studio of" the artist faces a tough decision, but not an investment decision.

In March 1983 and the following months—after LHLC inspected the inventory and concluded that it was worth $7.9 million, and Cluett rebuffed its claim for an adjustment of the price—LHLC had to decide whether to file suit under the securities laws or Cluett's warranty. That litigating decision is the same sort of choice facing the buyer of art or the tenant having trouble with the landlord. We have held repeatedly in recent years that the securities laws do not ensure that people will receive information sufficient to make correct decisions about filing or pursuing lawsuits. E.g., *Harris Trust*, 810 F.2d at 704; *Ray v. Karris*, 780 F.2d 636, 641-43 (7th Cir.1985); *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 833-34 (7th Cir.1985); *O'Brien v. Continental Illinois National Bank*, 593 F.2d 54, 60-61 (7th Cir.1979); *Goodman v. Epstein*, 582 F.2d 388, 409-14 (7th Cir.1978) (distinguishing between a misrepresentation after a one-shot deal, which is not actionable even though it could be pertinent to litigation, and a fraud after the closing that is pertinent to future investment decisions such as the contribution of additional capital, which is). Any impli-

cation to the contrary in *Wright v. Heizer Corp.*, 560 F.2d 236, 250 (7th Cir.1977), must be read in light of these later cases. Deloitte's letter came too late to affect the closing; by the time LHLC received the letter, it had inspected the inventory itself and decided that $7.9 million was too high; any falsity in Deloitte's letter did no more than deprive LHLC of a bargaining chip in negotiations with Cluett or of evidence in a subsequent suit. This is not a *securities* problem.

LHLC tries to avoid the force of this by contending that Deloitte aided and abetted Cluett's violations, which preceded the closing. We have held that victims may collect from aiders and abetters under § 10(b) and Rule 10b-5 even though they do not satisfy the requirements of controlling or controlled party liability under § 20 of the '34 Act, 15 U.S.C. § 78t. *Brennan v. Midwestern United Life Insurance Co.*, 259 F.Supp. 673 (N.D.Ind. 1966), affirmed, 417 F.2d 147 (7th Cir.1969). That conclusion has not received universal approbation, see Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 Calif.L.Rev. 80 (1981), and the Supreme Court has reserved the question for future decision. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379 n. 5, 103 S.Ct. 683, 685 n. 5, 74 L.Ed.2d 548 (1983). We need not revisit the subject, because the aiding-and-abetting claim fails under *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir.1986). *Barker* concludes that a party other than the purchaser or seller of the securities faces liability as an aider and abetter only if it committed one of the fraudulent or manipulative acts with the requisite intent—that is, only if it would have been primarily liable had it purchased or sold the securities. See also *First Interstate Bank of Nevada, N.A. v. Chapman & Cutler*, 837 F.2d 775, 778-80 (7th Cir.1988).

When the problem consists in keeping silence while the primary violator carries out the fraud, the plaintiff must

show that the silent person had a legal duty to speak. *Barker*, 797 F.2d at 496-97. *Barker* held that a law firm and an accounting firm were not obliged to speak up concerning any knowledge they may have had about an ongoing fraud, and as a result their silence—even if morally culpable—did not have legal consequences under the securities laws. *First Interstate Bank* came to a similar conclusion about a law firm that did not publicize its doubts about the enforceability of some municipal bonds. LHLC's claim fails for the same reason. Even if Deloitte consulted with Cluett and reviewed the initial $7.9 million estimate before the closing, even if Cluett's estimate is fraudulent, Deloitte had no obligation to blow the whistle. Such an obligation could be imposed by state or federal law; perhaps one should be imposed; but none has been imposed. Deloitte therefore was answerable only for what it communicated to LHLC, and it did not communicate with LHLC until after the closing.

The complaint does not charge Deloitte with any other wrongdoing. Although LHLC now invites speculation that Deloitte had assured Cluett in advance that it would verify any estimate, and thus made Cluett bold enough to lie, speculation does not satisfy the requirement of Fed. R.Civ.P. 9(b). The complaint does not contain an allegation, "with particularity" or otherwise, about Deloitte's activities before the closing. The district court properly dismissed the complaint against Deloitte.

II

The contract called for Cluett to ascertain by early April 1983 the value of fluctuating items as of January 31, 1983, and to send LHLC a "Purchase Price Schedule". This schedule was conclusive, with the proviso that LHLC could obtain a binding resolution by an independent accounting firm. Cluett submitted the "Purchase Price Schedule" on April 5, 1983, showing that Cluett owed LHLC $20,000. On May 4 LHLC sent Cluett a

letter complaining about several items on the Purchase Price Schedule, including inventory—which LHLC said was overvalued by $2,772,000. At a meeting on May 10 Touche Ross & Co., LHLC's accountant, expressed the opinion that the valuation of $7.9 million could not have been produced by the application of generally accepted accounting standards. Cluett replied by letter of May 19 that the inventory dispute did not concern the Purchase Price Schedule, because the contract forbade any changes in the closing balance sheet submitted on February 4. Cluett treated the protest as a claim under the warranty, which it rejected on the ground that the parties had discussed and agreed before the closing on the treatment of markdowns concerning the inventory. This letter enclosed a check for $20,000. Apparently accepting Cluett's view that the inventory matter was not a dispute about the Purchase Price Schedule, LHLC did not request resolution by an independent accounting firm. It filed this suit in 1986, almost two years after entering bankruptcy.

Cluett asserted that the suit is barred by laches, waiver and estoppel: laches because its defense has been injured by the delay, waiver because LHLC intentionally surrendered its right to sue by conducting business as usual with Cluett after the dispute arose. The district court did not resolve these claims, and we do not do so either. The defense of laches calls for evaluation of prejudice on which the district court should have the leading role. Waiver is a contractual defense. LHLC could surrender its claim for a peppercorn. But it did not sign a writing surrendering the claim, and there is a dispute about whether such an agreement should be implied. Our most recent brush with Illinois' rules governing waiver of the right to sue, by continuing to do business, led us to conclude that such claims turn on questions of intent and duress. *Havoco of America, Inc. v. Hilco, Inc.*, 731 F.2d 1282 (7th Cir. 1984), after remand, 799 F.2d 349 (7th Cir. 1986) (twice reversing grants of summary judgment for the defendants). We said "that an essential element

of waiver is that the injured party intended to affirm the contract and intended to abandon his right to recover damages." 799 F.2d at 354. See also *Bledsoe v. Carpenter*, 163 Ill. App. 3d 823, 516 N.E.2d 1013 (3d Dist. 1987). The record contains information looking in both directions on questions of LHLC's intent in 1983, making an award of summary judgment on this issue inappropriate.

The district court nonetheless granted summary judgment to Cluett, holding that no matter what message LHLC *intended* to convey, Cluett *understood* LHLC to have abandoned its claim, and relied on that understanding by extending credit. Under Illinois law a person may be estopped if the adverse party relied to its detriment on misleading acts or representations and had no way to learn the truth. *Pantle v. Industrial Commission*, 61 Ill.2d 365, 335 N.E.2d 491, 495 (1975); *Pavlakos v. Illinois Department of Labor*, 128 Ill. App.3d 783, 84 Ill. Dec. 18, 471 N.E.2d 547, 553 (1st Dist. 1984), affirmed, 111 Ill.2d 257, 95 Ill. Dec. 461, 489 N.E.2d 1325 (1985). The district court found these elements.

The foundation for Cluett's invocation of estoppel is an affidavit from its Chairman, Henry Henley, stating: "Had Cluett known that LHLC intended to pursue a claim for the alleged inventory overvaluation, Cluett would not have extended credit to LHLC's subsidiary, Lytton's." Henley also stated that LHLC conveyed the impression in the spring of 1983 that it would not pursue the claim. Henley maintained that Matt Kallman, one of LHLC's two stockholders, made such a representation in late May 1983, but Kallman filed an affidavit denying that such a conversation had occurred, so this cannot be the basis of a grant of summary judgment. Moreover, on May 31, 1983, one of LHLC's attorneys wrote Cluett a letter stating that LHLC had "requested that I advise you that it cannot agree with your conclusions with regard to its claims for breaches of warranties. LHLC

Corporation will continue to pursue its rights with regard to the matter."

On June 15, 1983, Henley spoke by phone with Tom Rafferty, LHLC's other shareholder. Henley insists that Rafferty said point blank that LHLC would give up its warranty claim; Rafferty's affidavit says:

> I told Henry Henley that our attorney strongly recommended that we file suit for the inventory valuation misstatement. In fact, I believe Cluett received a letter from our legal counsel indicating this position. When Henry Henley called concerning this letter, I told Henry Henley that we bought the business to operate it successfully, and we had neither the money, the time nor the desire to enter suit against Cluett. At no time did I say or imply that we were foreclosing the possibility of legal action in the future.

Rafferty's position, in other words, was that he told Henley that LHLC would not sue now, but said nothing about suing later. Rafferty portrayed LHLC as a cash-starved venture, whose managers were struggling to keep the business going and who in June 1983 had neither time to devote to securities litigation nor the money to finance it. Those circumstances might change. The district court accepted Rafferty's version of the conversation, as it had to for purposes of summary judgment.

Henley contended, and the district court found, that Cluett reasonably inferred that LHLC would not sue then or ever, even if this is not what Rafferty meant. Cluett then extended trade credit to LHLC, which it would not have done if it had known it would be facing LHLC in court. The extension of credit was reliance, detrimental in retrospect because LHLC filed for bankruptcy while owing Cluett $180,000. (The record does not reveal how much of this Cluett is likely to receive in the bankruptcy.)

The lynchpin of this sequence is Henley's statement that Cluett would not have extended credit to LHLC if the two firms were soon to meet in court. The district court characterized this as uncontradicted, and therefore as sufficient support for summary judgment. Yet it is a statement of Henley's intent to do something, not a statement about a fact that can be contradicted by hard evidence. Since Henley did not think that LHLC would sue, the statement was never put to the test. It is not now falsifiable, even if it is false. It may be that "[t]he state of a man's mind is as much a fact as the state of his digestion", *Edgington v. Fitzmaurice*, (1884) 29 L.R. 459, 483 (Ch.Div.) (Bowen, L.J.), but it is not the kind of fact that is readily met by other affidavits.

Cluett had the burden of establishing detrimental reliance. If Henley's self-serving statement about his intent is untrue, Cluett has not carried that burden. A finder of fact would be free to disbelieve Henley's description of his intent, even if there were no contrary evidence. The mere possibility that a jury would find Henley an incredible witness is not sufficient to send this case to a trial, however, if there is no reason to expect such a disposition. Courts do not hold civil trials on the off-chance of irrational behavior by juries. We think, however, that LHLC would have a fair argument in this case; it could appeal to reason rather than to whim if it urged a trier of fact to disagree with Henley's description of his plans.

Henley was describing a business practice: Cluett would not extend trade credit to its adversaries in litigation. Cluett is a large supplier of dry goods. LHLC cannot be the first of Cluett's customers to threaten suit. Did Cluett cut off open account credit to other adversaries? We do not know, and the absence of such information could lead a jury to doubt Henley's words. If other adversaries got credit, why not LHLC? More to the point, Cluett extended credit to LHLC while the firm

was unambiguously threatening suit. During May 1983 LHLC told Cluett in no uncertain terms that it thought it was took. Between May 4 and June 15, Cluett had to assume (even on Henley's view of things) that it was likely to be the defendant in a suit. During that period, Cluett sold goods to LHLC on open account credit as if nothing were amiss. Cluett apparently treated Lytton's as an ordinary customer, assessing the credit risks it was taking and acting accordingly. As Cluett acted in this fashion before June 15, a jury could conclude that it would have continued doing so.

Cluett treats the sale of goods on credit as a favor to LHLC. Doubtless firms do not do favors for their adversaries. A jury might question this approach to trade credit, however. Cluett is a merchant. Following the divestiture on February 4, 1983, Lytton's was a major customer. If Cluett refused to deal on the terms ordinary in the trade, Lytton's might turn to other suppliers, leaving Cluett with unused capacity and unsold inventory. Cluett was selling goods on credit to LHLC—which it knew to be thinly capitalized—because it thought the transactions profitable. A suit by LHLC would not make them less so. If the sales on open account credit were profitable to Cluett, as we must suppose Cluett believed, then Cluett would injure itself by breaking off dealing. A firm might do this for strategic reasons; termination injures both sides, and Cluett might have believed that cutting off credit would have injured LHLC more than it injured Cluett, bringing LHLC to its knees. Even this is open to doubt, however. Cluett's credit to Lytton's hovered around $200,000; LHLC's claim was in the neighborhood of $2.7 million. A threat to withdraw a line of credit less than 10% of the adverse claim does not induce all reasonable businesses to capitulate. Trade credit is common in large measure because sellers can take security interests in the inventory; the seller's risk is substantially less than the amount of the credit. Even a thinly capitalized firm like LHLC therefore had other options—or

so a trier of fact might conclude—making Cluett's threat to pull the plug an empty gesture, the equivalent of threatening to shoot itself in the foot. If Cluett would have had sound business reasons to continue to deal with LHLC despite an ongoing dispute about the value of the inventory, then a jury rationally could disbelieve Henley's assertion. And if it did, the basis of the finding of detrimental reliance would vanish.

The district court thought that Henley's affidavit accurately conveyed the state of things: Cluett heard LHLC to say that it would not sue, and but for that impression would not have extended trade credit. That may be exactly right, and as a result may extinguish LHLC's claim. (LHLC apparently concedes that reasonable, detrimental reliance obliterates the claim rather than serving as an offset; we need not decide whether this is correct.) But a rational trier of fact could take a different view about Henley's statement. Since Cluett bears the risk of non-persuasion on the estoppel question, a fair doubt about Henley's assertion precludes the award of summary judgment even though LHLC has not presented evidence of its own that Cluett *would* have extended credit had LHLC filed suit in June 1983. When proof fails, the party with the risk of non-persuasion loses. *United States v. Sblendorio*, 830 F.2d 1382, 1396 (7th Cir.1987). Contrast *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986) (the party bearing the burden will have to present evidence to resist the motion and may not rest on the possibility that the jury will disbelieve the moving party's evidence); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553-55, 91 L.Ed. 2d 265 (1986).

There are disputed issues of material fact concerning estoppel, waiver, and laches. Perhaps the assembly of a more complete record will permit these to be resolved on a further motion for summary judgment. So long as we draw all reasonable inferences in LHLC's favor—as we

must—the existing record does not permit a disposition in Cluett's favor.

The judgment is affirmed to the extent it dismisses the complaint against Deloitte. It is reversed to the extent it grants summary judgment in favor of Cluett. The case is remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 778

LHLC CORPORATION,
Plaintiff

vs.

CLUETT, PEABODY & CO., INC. and
DELOITTE, HASKINS & SELLS,
Defendants.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

LHLC Corporation ("LHLC") brings this action pursuant to the Securities Exchange Act of 1934, 15 U.S.C. ¶ 78a, et seq., charging that defendants defrauded it by materially misrepresenting the value of inventory during the sale of a company to plaintiff in February, 1983. LHLC also asserts pendent state law claims for fraud, misrepresentation, and negligence. Cluett, Peabody & Co. ("Cluett"), which sold plaintiff the company at issue, has moved for dismissal on grounds of accord and satisfaction, plaintiff's failure to invoke the arbitration procedure required under the contract, waiver, estoppel, and laches. Cluett's accounting firm, Deloitte, Haskins & Sells ("DH&S"), has incorporated these defenses in its own motion to dismiss, which further argues that the amended complaint fails to plead fraud with the necessary specificity.

Because the parties have appended affidavits and other evidentiary material to their pleadings, these motions will be treated as ones for summary judgment. Fed. R. Civ. Pro. 12(b). Of course, this court can grant summary judgment only if the pleadings and evidence before it show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). In ruling upon the motions, the court must construe the record and any reasonable inferences drawn from it in the light most favorable to the party opposing the motion. *See P.H. Glatfelter Co. v. Voith, Inc.*, 784 F.2d 770, 774 (7th Cir. 1986).

FACTS

On February 4, 1983, Matt Kallman and Thomas Rafferty, the sole stockholders of LHLC, signed an agreement on behalf of their company to buy Henry C. Lytton & Company ("Lytton's") from Cluett. The forty-nine page purchase agreement provided for a base purchase price of $14,454,000, reflecting the December 31, 1982, book value of Lytton's stock as shown on the "closing balance sheet." Pl. Ex. A at 4-6. This base price was subject to adjustments due to fluctuations in Lytton's financial position between the end of 1982 and the closing of the deal on February 4. *Id* at 4-5.

According to the contract, the final value of these fluctuating terms was to be submitted by Cluett within 60 days of the closing. Should LHLC find the submitted values unacceptable, any dispute not settled by June 30, 1983, over this final "purchase price schedule" was subject to binding resolution by an independent certified accounting firm. *Id.* at 7. The agreement expressly provided that the purchase price schedule would not change the closing balance sheet upon which the deal was predicated. *Id.*

The figures on that balance sheet could only be questioned in a breach of warranties claim brought pursuant

to articles III and IV of the contract. Among the seller's warranties enumerated in article III, Cluett represented: [1]

> *Section 3.16. Inventories.* The inventory shown on the Closing Balance Sheet and the inventory acquired by the Company subsequent to the Balance Sheet Date consist of items of a quality useable or saleable in the normal course of the business of the Company. The values at which such inventory is reflected on the Closing Balance Sheet are in accordance with Section 2.2 hereof.

Id. at 21. That section, which stated in relevant part that the closing balance sheet was drawn up in accordance with generally accepted accounting principles, noted the following qualification:

> (ii) inventories are valued based upon the retail method of accounting with no reserve or adjustment for the last-in, first-out method of accounting. In this connection the parties understand and agree that the Company took markdowns in December 1982 in the value of its inventories in the approximate amount of $657,000 at retail.

Id. at 6.

Like other representations made in the contract, the warranty respecting inventory values was "strictly relied upon by the other party" and to survive the closing in full force for a period of one year. *Id.* at 35. The value of the inventories noted in the December 31, 1982 Closing Balance Sheet was $7,594,000.

---

[1] Cluett also warranted that:

> The Closing Balance Sheet presents fairly the financial condition of the Company [Lytton's] as of its date, all in accordance with generally accepted accounting principles consistently applied except as described in Section 2.2(b) hereof.

Sometime later, Cluett drew up a second balance sheet reflecting the financial position of Lytton's as of January 31, 1983 and valuing Lytton's inventories on that date at $7,921,000.[2] On March 7, 1983, DH&S sent Cluett a letter in which it observed that this figure "reflects judgments made by the seller as to the value of the merchandise assuming disposition in the normal course of business. . . ." Pl. Ex. B. Based on its observation, DH&S concluded that Cluett's valuation was "fairly stated in conformity with generally accepted accounting principles." *Id.*

On April 5, 1983, as required by the purchase agreement, Cluett sent LHLC a copy of the final purchase price schedule, along with several other statements of intercompany accounts. According to Cluett, the net result of all these statements was that it owed LHLC $20,000. Henley Aff., Ex. A. LHLC's May 4, 1983 reply letter objected to Cluett's price schedule on several grounds including overvaluation at retail of Lytton's inventory in the amount of $2,772,000.[3] Henley Aff., Ex. B. The next day, when the parties and their respective accountants met to discuss the overvaluation issue, it became clear that LHLC's position was predicated on (1) its belief that much of Lytton's merchandise was old, of poor quality, or not saleable in the normal course of business and (2) the fact that prior to December 31, 1982, merchandise which had not sold at a marked-down price was marked back up to retail price and included in inventory at the higher value. Lill Aff., Ex. A; Amended Complaint at ¶ 12.

For reasons that will become apparent in the discussion later on, Cluett's response to LHLC's position and

---

[2] This second balance sheet, referred to in the amended complaint and the DH&S letter of March 7, 1983, has not been provided to the court.

[3] Apparently, the inventory valuation problem was first discovered fairly soon after the closing. See Rafferty Aff. at ¶ 3.

the events following it are critical to resolving the motions before the court. That response came in the form of Robert Krumme's May 19, 1983, letter to Rafferty and Kallman. There, Krumme, Cluett's vice-president and general counsel, rejected LHLC's attempt to label the inventory issue as a "purchase price schedule" dispute. He noted that the contract barred changes in the closing balance sheet, which listed inventory as an asset, and went on to state:

> Since none of the allegations in your letter constitute an objection to the Purchase Price Schedule and since the period for such objections has expired, the purchase price is final with $236,000 being due us. . . . At the same time we are prepared to settle our [other] account[s] . . . as submitted with the Purchase Price Schedule.
>
> We are therefore enclosing herewith our check in the amount of $20,000. . . .

Henley Aff., Ex. C.

Because of his view that the inventories had no bearing on the purchase price as defined in the purchase price schedule, Krumme chose to treat LHLC's position as a claim for breach of warranty [4] which he regarded as "at best specious." Krumme stressed "the clear intent of the parties that inventory valuation be established prior to execution of the Agreement; the Agreement specifically provides that the parties understood *and agreed upon* the markdowns which were taken in December 1982." Henley Aff., Ex. C. (emphasis original).

Although LHLC protested through its attorney that it would continue to pursue its warranty claims, there is evidence submitted by both sides suggesting that Cluett and LHLC conversed regarding whether the latter would

---

[4] LHLC's May 4, 1983 letter presented the inventory issue as both a purchase price schedule dispute and a warranty breach.

actually file suit. See Henley Aff., Exs. E and G.; Rafferty Aff. at ¶ 7. Because this motion for dismissal is brought by Cluett, I must accept Rafferty's characterization of the discussions:

> I told Henry Henley that our attorney strongly recommended that we file suit for the inventory valuation misstatement. In fact, I believe Cluett received a letter from our legal counsel indicating this position. When Henry Henley called concerning this letter, I told Henry Henley that we bought the business to operate it successfully, and we had neither the money, the time, nor the desire to enter suit against Cluett. At no time did I say or imply that we were foreclosing the possibility of any legal action in the future.

Rafferty Aff. at ¶7.[5]

One reason LHLC lacked the desire to litigate with its former parent at that time stemmed from its dependence on Cluett for both merchandise and credit. Cluett was Lytton's major supplier of goods for resale and, although the former "advanced no more credit after closing than was advanced prior to closing," plaintiff admits that Cluett extended some credit and gave reassurances of

---

[5] Henry Henley's June 15, 1983, file memorandum of the conversation is remarkably similar:

> Tom Rafferty of Lytton's called and said he was calling to answer my letter to Matt Kallman and they did not plan to proceed any further with their demands. They would not proceed for three reasons: they didn't have the money; they didn't have the time; and they wanted to do business with us. There would be no further claims and he had given Merrill Dukes the check to process.

Henley Aff. at ¶ 7.

Henley's letter of June 7, 1983, suggests that Kallman also represented that LHLC would not pursue the inventory warranty claim. Kallman has denied making any such representation. Kallman Aff. at 3.

LHLC's solvency to other suppliers during a period of considerable financial distress for the newly-purchased company. Kallman Aff. at ¶¶ 4-5; Rafferty Aff. at ¶ 6. According to Henley's uncontradicted affidavit, Cluett advanced approximately $200,000 in credit to Lytton's. Henley's affidavit also states that "had Cluett known that LHLC intended to pursue a claim for the alleged inventory overvaluation, Cluett would not have extended [this] credit. . . ." Henley Aff. at ¶ 13.

On or about June 14, 1983, Rafferty endorsed and cashed the $20,000 check sent to him by Krumme one month earlier. The back of that check read:

> Endorsement and cashing of this check shall constitute full and final settlement of (i) the Purchase Price under the Purchase Agreement dated February 4, 1983 among the drawer and drawees hereof and (ii) the items reflected on Settlement Sheets submitted to the drawees on April 5, 1983 reflecting activity between the drawer and drawees through March 11, 1983.

Henley Aff., Ex. F.[6]

In its first quarter review, Lytton's took a $500,000 write down on the value of the inventory. It also spent substantial sums to replace the older inventory taken out of stock. Less than one year after the closing, Lytton's filed for bankruptcy.

---

[6] Krumme's accompanying letter states the limiting language somewhat differently:

> The amount tendered constitutes (i) full and final settlement of the Final Purchase Price called for by Article III of the Agreement owed by LHLC Corporation to Cluett. . . .

Henley Aff., Ex. C. The difference in language is immaterial, since the language on the back of the check is controlling. In any event, only article II (not III) describes the elements of the final purchase price.

DISCUSSION OF LEGAL ISSUES

I. Issues raised by Cluett and incorporated by DH&S.

A. Accord and Satisfaction.

The defendants argue strenuously that the cashing of the $20,000 check in June, 1983, by LHLC's agents represents an accord and satisfaction of the inventory dispute. A careful reading of the letter accompanying the check, however, belies that conclusion. That document shows that Cluett regarded the inventory claim to be "specious" and not covered by the purchase price schedule defined in the contract. *See*, Henley Aff., Ex. C. As evidenced by the limiting language on its reverse, the check was issued to settle issues regarding that schedule; no mention of warranty claims appears thereon.

To this end, the court rejects defendant's argument that LHLC is estopped from asserting a position contrary to its May 4, 1983, characterization of the inventory claim as a purchase price schedule dispute. Because Krumme's May 19th letter clearly rejected this characterization, defendant's suggestion that it relied on the position is meritless.[7]

B. Arbitration.

Cluett's contention that this action is barred by the closing contract's arbitration clause is based upon a simi-

---

[7] Even if the inventory claims were covered by the endorsement language, it is doubtful that the parties executed an accord and satisfaction. Under Illinois law, payment of an amount undisputably owed is not consideration for accord and satisfaction of a greater amount actually disputed. *Germann v. Pekow*, 531 F.Supp. 357 (N.D. Ill. 1982) (following common law as exemplified by Illinois). Here, there was never any disagreement that Cluett owed LHLC $20,000, the former having brushed aside all objections to the purchase price schedule as either stale or without merit. *See* Henley Aff., Ex. C. at 2.

lar misreading of the document.[8] That clause, which covered "any aspect of the Purchase Price Schedule," did not extend to representations underlying the closing balance sheet. Amended complaint, Ex. A at 7. As noted above, the court believes Krumme's May 19th letter makes this apparent. In any event, the matter is conclusively established by article VII of the agreement, which both parties failed to bring to the court's attention. Section 7.1 states that "all representations, warranties and covenants . . . shall survive the Closing hereunder and continue in full force and effect thereafter until the first anniversary of the Closing date. . . ." *Id.* at 35. Arbitration of the purchase price schedule, on the other hand, was to begin (if necessary) no later than five months after the closing. *Id.* at 7. In light of these different timetables, as well as the rest of the contract language, I find that arbitration of the inventory dispute was not required by the agreement. Having reached this conclusion, the court need not resolve the parties' extended argument over whether plaintiff's securities fraud claims are subject to arbitration.

C. Waiver, Estoppel, and Laches.

Cluett's assertion that this suit is barred by waiver or estoppel has more merit. In *Saverslak v. Davis-Cleaver Produce, Co.*, 606 F.2d 208, 213 (7th Cir. 1979), *cert. denied* 444 U.S. 1078 (1980) the Court of Appeals, in discussing these two defenses, observed that the "principles of waiver and estoppel support the notion that a party to a contract may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for non-compliance."

---

[8] Defendants assert, without supporting argument, that "Counts I through IV clearly present claims that are within the scope of the arbitration clause, as outlined in the Agreement." Memorandum in Support of Cluett's Motion to Dismiss at 11-12. As explained in the text, the court finds defendants' construction both wrong in fact and contrary to their prior interpretation of the agreement.

Despite this common rationale, however, the doctrines are not interchangeable. As the Court stated:

> Analysis of the applicability of waiver focuses on the intent of the non-breaching party. If he has intentionally relinquished a known right, either expressly or by conduct inconsistent with an intent to enforce that right, he has waived it and may not thereafter seek judicial enforcement. . . .
>
> Estoppel, on the other hand, focuses not on the obligor's intent, but rather on the *effects* of his conduct on the obligee. . . . An estoppel . . . arises only when a party's conduct misleads another to believe that a right will not be enforced and causes him to act to his detriment in reliance upon this belief. Even if the obligor has not waived a known right, he may be estopped from enforcing it.

606 F.2d at 213 (citations omitted). *See also Pantle v. Industrial Commission*, 335 N.E.2d 491 (Ill. 1975). Where there is no dispute as to material facts, whether those facts constitute waiver or estoppel is a question of law. *Id.* at 494; *Havoco of America, Ltd. v. Hilco, Inc.*, 731 F.2d 1282, 1293 (7th Cir. 1984).

Waiver

Bearing these principles in mind, I turn first to the problem of waiver. There is no question, of course, that LHLC was aware of its rights to sue for breach of warranty. Its May 4th letter to Cluett advanced the $2,772,000 claim and Rafferty's affidavit admits that plaintiff's counsel advised it to sue. Rafferty Aff. at ¶ 7. What plaintiff does dispute is whether it intentionally relinquished that right.

In pressing the relinquishment point, Cluett observes that Raffetry expressly assured Henley that LHLC would not pursue the claim and then waited three years before

bringing suit.[9] See Henley Aff. at ¶ 11; Rafferty Aff. at ¶ 7 (set forth in statement of facts above). In a somewhat roundabout way, plaintiff replies that, under the circumstances, its delay did not harm Cluett and did not prejudice its own rights. LHLC also contends that the discussions between Rafferty and Henley manifested only Rafferty's desire to stay in business, not an intent to relinquish the right to sue. It cites as support the failure of the parties to execute a written release.

The court agrees with LHLC's implicit suggestion that mere delay in bringing suit generally does not prove as a matter of law an intention to relinquish rights. *See Havoco*, 731 F.2d at 1292, 1293 at n.9.[10] I find much more doubtful the contention that a reasonable jury could find that Rafferty's statement did not constitute a waiver. According to his affidavit, Rafferty told Henley that LHLC "had neither the money, the time, nor the desire to enter suit against Cluett." Such language is strongly indicative of waiver. Because I decide the motion on other grounds, however, I do not so hold. Accordingly, I find no need to address plaintiff's duress defense to waiver.

---

[9] To this end, Cluett also argues waiver from (1) Kallman's oral representations not to pursue the claim and (2) LHLC's cashing of the $20,000 check. I disregard the first because it is contradicted by Kallman's affidavit; the second is dealt with under my treatment of the accord and satisfaction issue.

[10] An exception to this general rule apparently exists where the delay stems from the damaged party's attempts to speculate on the outcome of the contract before suing for fraud. *See Havoco*, 731 F.2d at 1288, 1292-93. The facts of this case seem to fit into this pattern. LHLC discovered the fraud soon after the contract, but chose to make a "go" of it, knowing that it needed to maintain the relationship with Cluett to survive. They waited until the business failed before bringing suit. Given my decision above, I need not decide whether the plaintiff's actions here constituted the kind of "speculation" referred to by the *Havoco* court.

Estoppel

Unlike waiver, estoppel requires that Cluett show it "relied upon some acts or representation of [plaintiff] and had no knowledge or convenient means of knowing the true facts." *Pantle*, 335 N.E.2d 491, 495 (Ill. 1975).[11] Whatever Rafferty may have intended by his comment, the evidence shows that Henley took him to mean that LHLC was dropping its claim and relied upon that understanding in dealing with Lytton's new management. Indeed, Henley's affidavit states that "[h]ad Cluett known that LHLC intended to pursue a claim for the alleged inventory overvaluation, Cluett would not have extended credit to LHLC's subsidiary, Lytton's." Henley Aff at ¶ 13. This fact is uncontradicted by any evidence before the court and is not weakened by plaintiff's observation that LHLC's request for more generous credit terms was denied. The point is that, at a time in which Cluett was under no duty to deal with Lytton's on any terms, it continued to extend credit to the new company. *Id.;* Kallman Aff. at ¶ 4. When Lytton's filed for bankruptcy, it

---

[11] The plaintiff's statement of the law is outdated; the six part test it cites is now generally collapsed into the more flexible analysis I have relied on above. See *Pantle*, 335 N.E.2d at 495; *Old Security Life Ins. Co. v. Continental National Bank*, 740 F.2d 1384, 1393 (7th Cir. 1984) (applying Illinois law). Moreover, its suggestion that misrepresentation of future events (such as "I won't sue") cannot give rise to estoppel is simply unsupported by the authority it presents.

A similar problem invalidates its unclean hands argument, which, if taken at face value, would preclude any defendants charged with fraud from asserting estoppel, waiver, or laches defenses. The only case cited for its support, *Great Western Cities, Inc. v. Binstein*, 476 F.Supp. 827 (N.D. Ill. 1979), *aff'd* 614 F.2d 775 (1979), involved assertions by the State of Illinois of "massive" fraud against a plaintiff who sought a preliminary injunction. I decline to apply such a generally disfavored doctrine to circumstances completely different from those that might justify its application. *See Id.*, at 832; *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 601 (7th Cir. 1985) (clean hands doctrine is not to be used as a "loose cannon.")

owed Cluett over $179,000 for goods bought on credit. Henley Aff. at ¶ 13.

Taken together, these facts show that Cluett relied on LHLC's promise not to sue. Moreover, I believe that given Rafferty's characterization of his own statement, no jury would find Cluett's reliance unreasonable. I hold, therefore, that an action against Cluett based upon the inventory claims is barred by estoppel and must be dismissed.

Because the reliance creating an estoppel was specific to Cluett, the court's ruling does not release DH&S. For similar reasons, the court is not persuaded by the accounting firm's remaining incorporated argument based on laches. For the doctrine to apply under Illinois law, "it must appear that a plaintiff's unreasonable delay in asserting his rights has prejudiced and misled the defendant, or caused him to pursue a course different from what he would otherwise have taken." *DeBruyn v. Elrod*, 418 N.E.2d 413, 417 (Ill. 1981). Here, DH&S has made no effort to meet this standard and there is no basis on which to invoke the doctrine's bar.

II. Issues raised solely by DH&S.

DH&S has chosen to frame its attack on the complaint under Rule 9(b) of the Federal Rules of Civil Procedure. That Rule states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In invoking the rule, DH&S's memorandum of law charges that the complaint sets forth "no factual basis for the conclusory assertion that DH&S acted with the requisite scienter." It makes a similar charge respecting plaintiff's aiding and abetting and conspiracy allegations.

From its brief, it is apparent that DH&S is familiar with this court's view of what facts a securities fraud complaint must plead to meet the requirements of Rule 9(b). In *McKee v. Pope Ballard Shepard & Fowle, Ltd.*, 604 F. Supp. 927 (N.D. Ill 1985), I observed that

> at the least, a plaintiff pleading fraud must specify the time, place, and contents of any alleged false representations, and the full nature of the transaction. This should include the identity of the person making the representations, and how the misrepresentations were communicated to the plaintiff.

McKee, 604 at 930 (citations omitted). The purpose of these requirements, as I stated in that case, is to provide defendants with sufficient notice to enable response to the charges, to prevent abuse of liberal federal discovery procedures, and to protect defendants from unfounded accusations which may injure their professional and personal reputations. *Id.*

Unlike in *McKee*, the plaintiff here has "alleg[ed] events from which fraud and other wrongdoing may be inferred." *Id.*, at 931. Specifically, the Amended Complaint charges, in essence, that DH&S's March 7, 1983, opinion letter made the following material omissions:

> 1. that a substantial part of the inventory was not useable or saleable in the normal course of business; and
>
> 2. that merchandise which had not sold at a marked-down clearance price was calculated in the inventory valuation on the closing balance sheet at the original price.

See, Amended Complaint at ¶ 12(b) and (c). As a result of these omissions, LHLC contends that DH&S "knowingly or in reckless disregard of the facts" certified Cluett's false representation as to inventory value. *Id.* at ¶ 15. This assertion of DH&S's state of mind is based on its written statement, expressly made for the

benefit of LHLC and others, that it had examined Lytton's inventory "in accordance with generally accepted auditing standards." Amended Complaint, Ex. B.

I find these allegations sufficient to withstand DH&S's Rule 9(b) attack. If proved at trial, they might constitute wrongdoing supporting an inference of fraud. Whatever the outcome, the acts charged are specific enough to enable the accounting firm to prepare its defense. This is not to say that the court does not sympathize with DH&S's suggestion that the complaint may contain a fatal flaw. *See* DH&S Reply Memorandum in Support of Motion to Dismiss, at 5-6. Simply put, LHLC does not explain how a March 7th, 1983, letter could have been a "material part" of an earlier purchase agreement which never mentions the submission of future financial statements. There may be circumstances which explain this dilemma, but I am not aware of them.

Nevertheless, that reliance issue is not before the court. While reliance is a necessary element of the securities fraud claims at issue here, I do not agree with DH&S's suggestion that the amended complaint's weakness in this respect is a pleading failure justifying dismissal under Rule 9(b). The facts alleged by plaintiff here are sufficient to satisfy the policies behind the rule. Because DH&S's arguments regarding the conspiracy and aiding and abetting claims are based on its belief that plaintiff here has failed to adequately plead fraud, they also fail to persuade the court.

CONCLUSION

For the reasons stated herein, defendant Cluett's motion to dismiss is granted and the motion of defendant DH&S is denied.

It is so ordered.

/s/ Susan Getzendanner
SUSAN GETZENDANNER
United States District Judge

October 27, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 11, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*

No. 86-3055

LHLC CORPORATION,
Plaintiff-Appellant,
v.

CLUETT, PEABODY & COMPANY, INC., and
DELOITTE, HASKINS & SELLS,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 778—Susan Getzendanner, *Judge*

ORDER

Cluett, Peabody & Company, Inc., filed a petition for rehearing and suggestion of rehearing en banc on

March 28, 1988. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.